

78-1517

Supreme Court, U. S.
FILED

APR 23 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-.....

RALPH HATHORN, ET AL.,
Petitioners,

vs.

MRS. BOBBY LOVORN, ET AL.,
Respondents.

OPPOSITION BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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Respondents deny that a Writ of Certiorari should issue to review the decision of the Supreme Court of Mississippi rendered on January 10, 1979.

In support of their argument that no Writ of Certiorari should issue in this matter respondents show that the State of Mississippi is composed of 82 counties. Each county in the State of Mississippi has an elected Board of Education, one member from each of the 5 Supervisor Districts in said county, except no elected Board of Education exists in Winston County and Grenada County. The elections are required by the laws of the State of Mississippi enacted long before 1965. The state law is being flouted in Winston County, Mississippi, and not enforced, and instead the Board of Education is composed of 5 members, 3 of whom are appointed by the Board of Aldermen of the City of Louisville, Mississippi, and not elected, and the Board of Aldermen is elected only by voters in the City of Louisville, Mississippi, and upon which the

voters living outside the City limits but in Winston County cannot vote. Two members are alleged by petitioners to be elected by voters in the county, but there is no clear showing that it is a legal or fair election and instead is held in secrecy. In fact, it would do no good to elect 2 members when the other 3 constitute the majority and have full say so in requesting the taxes for the land in the entire county and directing the policies of the school including employing teachers, school officials, and setting the standards for the patrons of the entire County School System.

There are 2,675 pupils outside the City limits of Louisville and 1,418 pupils inside the City limits. The population of Winston County is approximately 18,406 of which number approximately 7,000 live within the City of Louisville.

Not only would the election of trustees as provided by the Mississippi Statute be equitable and fair, but also would give the right of individuals residing outside the Louisville City limits the right to vote for trustees now being unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Suit was filed as a class action composed of Blacks, Reds, and Whites in the United States District Court for the Northern District of Mississippi to enforce the same rights granted by the Mississippi Supreme Court to respondents. The United States District Judge held the matter in abeyance while the matter was tried in the state courts and while the Mississippi Supreme Court had the matter for consideration. After the Mississippi Supreme Court ruled in favor of respondents said United States District Court dismissed the case pending there as being a moot question.

The petitioners argue that this Court has previously declared that a decree of a United States District Court is not within the reach of Section 5 of the Voting Rights Act of 1965 as amended but contend the decision of the Mississippi Supreme Court would be. However, the United States District Court for the Northern District of Mississippi had jurisdiction of the matter and held it until the decision of the Mississippi Supreme Court and then declared the matter moot from that point on and dismissed their action, giving their sanction to the decision of the Mississippi Supreme Court.

It is interesting to note that on page 7 the petitioners submit the change to election by Supervisors' Districts has a potential of discrimination. No Blacks have ever served on the Board of Education by appointment or election or on the Board of Supervisors. The Board of Aldermen could appoint a Black member but have not. The Blacks join in the request for an election just as a majority of all of the citizens of Winston County, Mississippi. Again, let it be said that the election law involved was enacted long before 1965 and has now been before the Mississippi Supreme Court for the first time where it has been declared Constitutional and legal. When the Mississippi Code of 1972 was enacted it brought forward the statute from the 1942 Mississippi Code and same has been approved by the Attorney General.

Even if there were no Mississippi Statute providing for an election for the Winston County Board of Education, the "one man, one vote" principle would still be denied the citizens. As stated in *Avery v. Midland County*, 390 U. S. 474 (1968) it is an established principle that the Constitutional doctrine of "one person, one vote" applies to the election of the local officials who exercise general governmental powers.

The extension of the applicability of the "one person, one vote" doctrine to local school board elections is mandated by *Hadley v. Junior College District*, 397 U. S. 50 (1970) in which case the Court held that the "one person, one vote" principle applied to the election of members of the board of a junior college district.

In *Hadley* a state statute established a consolidated junior college district by referendum vote and elect trustees to conduct and manage the necessary affairs of the district. The trustees levied and collected taxes, hired and fired teachers, made contracts, collected fees, supervised students, acquired property, and in general, managed the operations of the district. The Court examined this exercise of authority and concluded:

"... as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that equal number of voters can vote for proportionally equal number of officials." 397 U. S. at 56.

The Court left little doubt that traditionally organized school districts perform the requisite "governmental functions".

The Court reasoned:

"Education has traditionally been a vital governmental function, and these trustees, whose election the state has opened to all qualified voters, are governmental

officials in every relevant sense of that term." 397 U. S. at 56.

It is clear that if it is found that the "one man, one vote" principle is applicable to the instant case, the fact that the county voluntarily entered into the municipal separate school district would not justify the malapportionment. As stated in *Powers v. Maine School Administrative District No. 1*, 359 F. Supp. 30 (N.D. Me. 1973):

"It is thus clear that the fact that Presque Isle voluntarily joined the defendant District cannot validate the District's malapportionment. The Supreme Court has consistently refused to permit a majority to debase the vote of a minority, and in this case the majority of the voters of Presque Isle who agreed to the dilution of their votes in the election of District directors cannot constitutionally deprive the minority of Presque Isle voters of their right to full representation on the District Board." 359 F. Supp. at 35.

The majority of the students who will be the future citizens of the State of Mississippi have no equal voice in the education of the children involved, such as the conditions and rules of the school attendance centers, selection of teachers, levying and collecting taxes and the position established by the school trustees.

One important case in point decided February 25, 1970, by the United States Supreme Court appearing in 397 U. S. at page 50, *Hadley v. Junior College District*, holds that whenever a State or local government by popular election selects persons to perform public functions the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter have an equal opportunity to participate in the election and when members of an elected body of persons from separate Districts each Dis-

trict must be established on a basis that as far as practicable will insure that equal numbers of voters can vote for proportionately equal numbers of officials, citing the case of *Avery v. Midland County*, 390 U. S. 474. The Decision of the United States Supreme Court, is as follows:

"Appellants, residents and taxpayers of the Kansas City School District, one of eight school districts constituting the Junior College District of Metropolitan Kansas City, brought this suit claiming that their right to vote for trustees of the district was unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment since their separate district contains approximately 60% of the total apportionment basis of the entire junior college district, but the state statutory formula results in the election of only 50% of the trustees from their district. The trial court's dismissal of the suit was upheld by the Missouri Supreme Court, which held the 'one man, one vote' principle inapplicable. Held: Whenever a state or local government by popular election selects persons to perform public functions the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter have an equal opportunity to participate in the election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that as far as practicable will insure that equal numbers of voters can vote for proportionally equal numbers of officials." *Aevry v. Midland County*, 390 U.S. 474, pp. 52-59.

432 S. W. 2d 328, reversed and remanded."

"Mr. Justice Black delivered the opinion of the Court.

"This case involves the extent to which the Fourteenth Amendment and the 'one man, one vote' principle apply

in the election of local governmental officials. Appellants are residents and taxpayers of the Kansas City School District, one of eight separate school districts that have combined to form the Junior College District of Metropolitan Kansas City. Under Missouri law separate school districts may vote by referendum to establish a consolidated junior college district and elect six trustees to conduct and manage the necessary affairs of that district. The state law also provides that these trustees shall be apportioned among the separate school districts on the basis of 'school enumeration', defined as the number of persons between the ages of six and 20 years, who reside in each district. In the case of the Kansas City School District this apportionment plan results in the election of three trustees, or 50% of the total number from that district. Since that district contains approximately 60% of the total school enumeration in the junior college district, appellants brought suit claiming that their right to vote for trustees was being unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment. The Missouri Supreme Court upheld the trial court's dismissal of the suit, stating that the 'one man, one vote' principle was not applicable in this case. 432 S. W. 2d 328 (1968). We noted probable jurisdiction of the appeal, 393 U. S. 1115 (1969); and for the reasons set forth below we reverse and hold that the Fourteenth Amendment requires that the trustees of this junior college district be apportioned in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the junior college district.

"In *Wesberry v. Sanders*, 376 U. S. 1 (1964), we held that the Constitution requires that 'as nearly as is prac-

ticable one man's vote in a congressional election is to be worth as much as another's' *Id.*, at 7-8. Because of this requirement we struck down a Georgia statute which allowed glaring discrepancies among the population in that State's congressional districts. In *Reynolds v. Sims*, 377 U. S. 533 (1964), and the companion cases, we considered state laws that had apportioned state legislatures in a way that again showed glaring discrepancies in the number of people who lived in different legislative districts. In an elaborate opinion in *Reynolds* we called attention to prior cases indicating that a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased or diluted. *Ex parte Siebold*, 100 U. S. 371 (1880); *Ex parte Yarbrough*, 110 U. S. 651 (1884); *United States v. Mosley*, 238 U. S. 383 (1915); *Guinn v. United States*, 238 U. S. 347 (1915); *Lane v. Wilson*, 307 U. S. 268 (1939); *United States v. Classic*, 313 U. S. 299 (1941). Applying the basic principle of *Wesberry*, we therefore held that the various state apportionment schemes denied some voters the right guaranteed by the Fourteenth Amendment to have their votes given the same weight as that of other voters. Finally, in *Avery v. Midland County*, 390 U. S. 474 (1968), we applied the same principle to the election of Texas county commissioners, holding that a qualified voter in a local election also has a constitutional right to have his vote counted with substantially the same weight as that of any other voter in a case where the elected officials exercised 'general governmental powers over the entire geographic area served by the body.' *Id.*, at 485.

"Appellants in this case argue that the junior college trustees exercised general governmental powers over the entire district and that under *Avery* the State was

thus required to apportion the trustees according to population on an equal basis, as far as practicable. Appellants argue that since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college, their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in *Avery*. We feel that these powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in *Avery* should also be applied here.

"This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions. Thus in the case now before us, while the office of junior college trustee differs in certain respects from those offices considered in prior cases, it is exactly the same in one

crucial factor—these officials are elected by popular vote.

“When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. If one person’s vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected.

“If the purpose of a particular election were to be the determining factor in deciding whether voters are entitled to equal voting power, courts would be faced with the difficult job of distinguishing between various elections. We cannot readily perceive judicially manageable standards to aid in such a task. It might be suggested that equal apportionment is required only in ‘important’ elections, but good judgment and common sense tell us that what might be a vital election to one voter might well be a routine one to another. In some instances the election of a local sheriff may be far more important than the election of a United States Senator. If there is any way of determining the importance of choosing a particular governmental official, we think

the decision of the State to select that official, by popular vote is a strong enough indication that the choice is an important one. This is so because in our country popular election has traditionally been the method followed when government by the people is most desired.

“It has also been urged that we distinguish for apportionment purposes between elections for ‘legislative’ officials and those for ‘administrative’ officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities ‘cannot easily be classified in the neat categories favored by civics tests’, *Avery, supra*, at 482, and it must also be rejected. We therefore, hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials. It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities, and so disproportionately affect different groups that a popular election in compliance with *Reynolds, supra*, might not be required, but certainly we see nothing in the present case that indicates that the activities of these trustees fit in that category. Education has traditionally been a vital governmental function, and these trustees, whose election the State has opened to all qualified voters, are

governmental officials in every relevant sense of that term.

"In this particular case the 'one man, one vote' principle is to some extent already reflected in the Missouri statute. That act provides that if no one or more of the component school districts has $33\frac{1}{3}\%$ or more of the total enumeration of the junior college district, then all six trustees are elected at large. If however, one or more districts has between $33\frac{1}{3}\%$ and 50% of the total enumeration, each such district elects two trustees and the rest are elected at large from the remaining districts. Similarly, if one district has between 50% and $66\frac{2}{3}\%$ of the enumeration it elects three trustees, and if one district has more than $66\frac{2}{3}\%$ it elects four trustees. This scheme thus allocates increasingly more trustees to large districts as they represent an increasing proportion of the total enumeration.

"Although the statutory scheme reflects to some extent a principle of equal voting power, it does so in a way that does not comport with constitutional requirements. This is so because the Act necessarily results in a systematic discrimination against voters in the more populous school districts. This discrimination occurs because whenever a large district's percentage of the total enumeration falls within a certain percentage range, it is always allocated the number of trustees corresponding to the bottom of that range. Unless a particularly large district has exactly $33\frac{1}{3}\%$, 50% , or $66\frac{2}{3}\%$ of the total enumeration it will always have proportionally fewer trustees than the small districts. As has been pointed out, in the case of the Kansas City School District approximately 60% of the total enumeration entitles that district to only

50% of the trustees. Thus while voters in large school districts may frequently have less effective voting power than residents of small districts, they can never have more. Such built-in discrimination against voters in large districts cannot be sustained as a sufficient compliance with the constitutional mandate that each person's vote count as much as another's as far as practicable. Consequently Missouri cannot allocate the junior college trustees according to the statutory formula employed in this case. We would be faced with a different question if the deviation from the equal apportionment presented in this case resulted from a plan that did not contain a built-in bias in favor of small districts, but rather from the inherent mathematical complications in equally apportioning a small number of trustees among a limited number of component districts. We have said before that mathematical exactitude is not required. *Wesberry, supra*, at 18, *Reynolds, supra*, at 577, but a plan that does not automatically discriminate in favor of certain districts is.

"In holding that the guarantee of equal voting strength for each voter applies in all elections of governmental officials, we do not feel that the States will be inhibited in finding ways to insure that legitimate political goals of representation are achieved. We have previously upheld against constitutional challenge an election scheme that required that candidates be residents of certain districts that did not contain equal numbers of people. *Dusch v. Davis*, 387 U. S. 112 (1967). Since all the officials in that case were elected at large, the right of each voter was given equal treatment. We have also held that where a State chooses to select members of an official body by appointment

rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws. *Sailors v. Board of Education*, 387 U. S. 105 (1967); cf. *Fortson v. Morris*, 385 U. S. 231 (1966). And a State may, in certain cases, limit the right to vote to a particular group or class of people. As we said before, '(v)iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.' *Sailors*, *supra*, at 110-111. But once a State has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.' *Gray v. Sanders*, 372 U. S. 368, 381 (1963).

"For the reasons set forth above the judgment below is reversed and the case is remanded to the Missouri Supreme Court for proceedings not inconsistent with this opinion.

Reversed and remanded."

As stated, the case of *Avery v. Midland County*, was decided April 1, 1968, and reported in 390 U. S. at page 474, and held that local units with general governmental powers over an entire geographical area may not, consistent with the Equal Protection Clause of the Fourteenth Amendment be apportioned among single-member districts of substantially unequal population, citing the case of *Reynolds v. Sims*, 377 U. S. 533.

"*AVERY v. MIDLAND COUNTY*, et al.

"Certiorari To The Supreme Court of Texas.

"No. 39 Argued November 14, 1967—

Decided April 1, 1968.

"The Midland County, Texas, Commissioners Court is the governing body for that county, and like other such bodies is established by the State's Constitution and statutes. It consists of five members—a County Judge, elected at large from the entire county, and four commissioners one elected from each of the four districts (precincts) into which the county is divided. Commissioners courts exercise broad governmental functions in the counties including the setting of tax rates, equalization of assessments, issuance of bonds, and allocation of funds; and they have wide discretion over expenditures. One district of Midland County, which includes almost all the City of Midland, had a population of 67,906, according to 1963 estimates. The others, all rural areas, had populations respectively, of about 852, 414, and 828. In this action challenging the County's districting petitioner alleged that the gross disparity in population distribution among the four districts violated the Equal Protection Clause of the Fourteenth Amendment. Three of the four commissioners testified at trial that population was not a major factor in the districting process. The trial court ruled for petitioner that each district under the State's constitutional apportionment standard should have 'substantially the same number of people.' An intermediate appellate court reversed. The State Supreme Court reversed that judgment, holding that under the Federal and State Constitutions the districting scheme was impermissible 'for the reasons stated by the trial court.' It held, however, that the work

actually done by the County Commissioners 'disproportionately concerns the rural areas' and that such factors as 'number of qualified voters, land areas, geography, miles of county roads, and taxable values' could justify apportionment otherwise than on a basis of substantially equal populations. *Held*: Local units with general governmental powers over an entire geographic area may not, consistently with the Equal Protection Clause of the Fourteenth Amendment, be apportioned among single-member districts of substantially unequal population. *Reynolds v. Sims*, 377 U. S. 533 (1964). Pp. 478-486.

"(a) The Equal Protection Clause reaches the exercise of state power, whether exercised by the State or a political subdivision. P. 479.

"(b) Although the state legislature may itself be properly apportioned the Fourteenth Amendment requires that citizens not be denied equal representation in political subdivisions which also have broad policy-making functions. P. 481.

"(c) The commissioners court performs some functions normally thought of as 'legislative', and others typically characterized in other terms; but, regardless of the labels, this body has the power to make a large number of decisions having a broad impact on all the citizens of the county. Pp. 482-483.

"(d) Though the Midland County Commissioners may concentrate their attention on rural roads, their decisions also affect citizens in the City of Midland. P. 484.

"406 S. W. 2d 422, vacated and remanded.

"Mr. Justice White delivered the opinion of the Court.

"Petitioner, a taxpayer and voter in Midland County, Texas, sought a determination by this Court that the Texas Supreme Court erred in concluding that selection of the Midland County Commissioners Court from single-member districts of substantially unequal population did not necessarily violate the Fourteenth Amendment. We granted review, 388 U. S. 905 (1967), because application of the one man, one vote principle of *Reynolds v. Sims*, 377 U. S. 533 (1964), to units of local government is of broad public importance. We hold that petitioner, as a resident of Midland County, has a right to a vote for the Commissioners Court of substantially equal weight to the vote of every other resident.

"Midland County has a population of about 70,000. The Commissioners Court is composed of five members. One, the County Judge, is elected at large from the entire county, and in practice casts a vote only to break a tie. The other four are Commissioners chosen from districts.

"The population of those districts, according to the 1963 estimates that were relied upon when this case was tried, was respectively 67,906; 852; 414; and 828. This vast imbalance resulted from placing in a single district virtually the entire city of Midland, Midland County's only urban center, in which 95% of the county's population resides.

"The Commissioners Court is assigned by the Texas Constitution and by various statutory enactments with a variety of functions. According to the commentary to Vernon's Texas Statutes, the court:

'is the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer, fills

vacancies in the county offices, lets contracts in the name of the county, builds roads and bridges, administers the county's public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as a board of equalization for tax assessments.'

"The court is also authorized, among other responsibilities to build and run a hospital. Tex. Rev. Civ. Stat. Ann., Art. 4492 (1966), an airport, *id.*, Art. 2351 (1964), and libraries, *id.*, Art. 1677 (1962). It fixes boundaries of school districts within the county, *id.*, Art. 2766 (1965), may establish a regional public housing authority, *id.*, Art. 1269k, Section 23a (1963), and determines the districts for election of its own members, Tex. Const., Art. V, Section 18.

"Petitioner sued the Commissioners Court and its members in the Midland County District Court, alleging that the disparity in district population violated the Fourteenth Amendment and that he had standing as a resident, taxpayer, and voter in the district with the largest population. Three of the four commissioners testified at the trial, all telling the court (as indeed the population statistics for the established districts demonstrated) that population was not a major factor in the districting process. The trial court ruled for petitioner. It made no explicit reference to the Fourteenth Amendment, but said the apportionment plan in effect was not 'for the convenience of the people,' the apportionment standard established by Art. V, Section 18, of the Texas Constitution. The court ordered the defendant commissioners to adopt a new plan in which each precinct would have 'substantially the same number of people.'

"The Texas Court of Civil Appeals reversed the judgment of the District Court and entered judgment for the respondents. 397 S. W. 2d 919 (1965). It held that neither federal nor state law created a requirement that Texas county commissioners courts be districted according to population.

"The Texas Supreme Court reversed the Court of Civil Appeals, 406 S. W. 2d 422 (1966). It held that under 'the requirements of the Texas and the United States Constitutions' the present districting scheme was impermissible 'for the reasons stated by the trial court.' 406 S. W. 2d, at 425. However, the Supreme Court disagreed with the trial court's conclusion that precincts must have substantially equal populations, stating that such factors as 'number of qualified voters, land areas, geography, miles of county roads and taxable values' could be considered. 406 S. W. 2d, at 428. It also decreed that no Texas Courts could redistrict the Commissioners Court. 'This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate.' 406 S. W. 2d, at 428-429.

"In *Reynolds v. Sims*, *supra*, the Equal Protection Clause was applied to the apportionment of state legislatures. Every qualified resident, *Reynolds*, determined has the right to a ballot for election of state legislators of equal weight to the vote of every other resident, and that right is infringed when legislators are elected from districts of substantially unequal population. The question now before us is whether the Fourteenth Amendment likewise forbids the election of local government officials from districts of disparate population. As has almost every court which has addressed itself to this question, we hold that it does.

"The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State.

"Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action. . . .'*Cooper v. Aaron*, 358 U. S. 1, 17 (1958).

"Although the forms and functions of local government and the relationships among the various units are matters of state concern, it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the State. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law.

"When the State apportions its legislature, it must have due regard for the Equal Protection Clause. Similarly, when the State delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process. If voters residing in over-size districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population. If the five senators representing a city in the state legislature may not be elected from districts ranging in size from 50,000 to 500,000, neither

is it permissible to elect the members of the city council from those same districts. In either case, the votes of some residents have greater weight than those of others; in both cases the equal protection of the laws has been denied.

"That the state legislature may itself be properly apportioned does not exempt subdivisions from the Fourteenth Amendment. While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decision making to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decision making at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference. In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens. We therefore see little difference, in terms of the application of the Equal Protection Clause and of the principles of *Reynolds v. Sims*, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties.

"We are urged to permit unequal districts for the Midland County Commissioners Court on the ground

that the court's functions are not sufficiently 'legislative.' The parties have devoted much effort to urging that alternative labels—'administrative' versus 'legislative'—be applied to the Commissioners Court. As the brief description of the court's functions above amply demonstrates, this unit of local government cannot easily be classified in the neat categories favored by civics texts. The Texas commissioners courts are assigned some tasks which would normally be thought of as 'legislative', others typically assigned to 'executive' or 'administrative' departments and still others which are 'judicial.' In this regard Midland County's Commissioners Court is representative of most of the general governing bodies of American cities, counties, towns, and villages. One knowledgeable commentator has written of 'the states' varied, pragmatic approach in establishing governments. R. Wood, in *Politics and Government in the United States* 891-892 (A. Westin ed. 1965). That approach has produced a staggering number of governmental units—the preliminary calculation by the Bureau of the Census for 1967 is that there are 81,304 'units of government' in the United States—and an even more staggering diversity. Nonetheless, while special-purpose organizations abound and in many States the allocation of functions among units results in instances of overlap and vacuum, virtually every American lives within what he and his neighbors regard as a unit of local government with general responsibility and power for local affairs. In many cases citizens reside within and are subject to two such governments, a city and a county.

"The Midland County Commissioners Court is such a unit. While the Texas Supreme Court found that the Commissioners Court's legislative functions are 'negligible,' 406 S. W. 2d, at 426, the court does have power

to make a large number of decisions having a broad range of impacts on all the citizens of the county. It sets a tax rate, equalizes assessments, and issues bonds. It then prepares and adopts a budget for allocating the county's funds, and is given by statute a wide range of discretion in choosing the subjects on which to spend. In adopting the budget the court makes both long-term judgments about the way Midland County should develop—whether industry should be solicited, roads improved, recreation facilities built, and land set aside for schools—and immediate choices among competing needs.

"The Texas Supreme Court concluded that the work actually done by the Commissioners Court 'disproportionately concern(s) the rural areas.' 406 S. W. 2d, at 428. Were the Commissioners Court a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organizations functions. That question, however, is not presented by this case, for while Midland County authorities may concentrate their attention on rural roads, the relevant fact is that the powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens, whether they reside inside or outside the city limits of Midland. The Commissioners maintain buildings, administer welfare services, and determine school districts both inside and outside the city. The taxes imposed by the court fall equally in all property in the county. Indeed, it may not be mere coincidence that a body apportioned with three of its four voting members chosen by residents of the rural area sur-

rounding the city devotes most of its attention to the problems of that area, while paying for its expenditures with a tax imposed equally on city residents and those who live outside the city. And we might point out that a decision not to exercise a function within the court's power—a decision, for example, not to build an airport or a library, or not to participate in the federal food stamp program—is just as much a decision affecting all citizens of the county as an affirmative decision.

"The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made be arbitrary or invidious. The conclusion of *Reynolds v. Sims* was that bases other than population were not acceptable grounds for distinguishing among citizens when determining the size of districts used to elect members of state legislatures. We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.

"This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems. Last Term, for example, the Court upheld a procedure for choosing a school board that placed the selection with school boards of component districts even though the component boards had equal votes and served unequal populations. *Sailors v. Board of Education*, 387 U. S. 105 (1967). The Court rested on the

administrative nature of the area school board's functions and the essentially appointive form of the scheme employed. In *Dusch v. Davis*, 387 U. S. 112 (1967), the Court permitted Virginia Beach to choose its legislative body by a scheme that included at-large voting for candidates, some of whom had to be residents of particular districts, even though the residence districts varied widely in population.

"The *Sailors* and *Dusch* cases demonstrate that the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government. We will not bar what Professor Wood has called 'The emergence of new ideology and structure of public bodies, equipped with new capacities and motivations' R. Wood, 1400 Governments, at 175 (1961). Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government; a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.

"The judgment below is vacated and the case is remanded for disposition not inconsistent with this opinion.

"It is so ordered."

There is ample other authority on the "one man, one vote" theory and the Mississippi Supreme Court should be congratulated on following the law as announced by the Honorable United States Supreme Court and not requiring the United States District Court to have to enforce same.

The Order of the United States District Court for the Northern District of Mississippi upholding the "one man,

one vote" proposition, but leaving the matter as to Constitutionality of the Mississippi Statute on election dated July 1, 1975, is made "Appendix A-1" and the decision of said District Court dismissing the issues as moot was made pursuant to memorandum on behalf of defendants filed February 9, 1979, in view of the Mississippi Supreme Court decision is attached and marked exhibit "Appendix B-1".

CONCLUSION

More could be said for denying the Petition for Writ of Certiorari but it is clear that the decision of the Mississippi Supreme Court is correct and no further authority should be cited to show that the Petition for Writ of Certiorari should be denied and motion is made for it to be denied.

Respectfully submitted,

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Attorney for Respondents

CERTIFICATE

I certify a true copy of this opposing brief for respondents was mailed postage prepaid to the usual post office address of opposing counsel, Hon. James C. Mayo, Fair and Mayo, Hon. William A. Allain, and Hon. Frank Dera-mus at their usual post office addresses on this April 20, 1979.

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Attorney for Respondents

APPENDIX

APPENDIX A-1

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

No. EC 74-161-S

SAMMY CARTER, et al
Plaintiffs

v.

MRS. CURTIS LUKE, et al
Defendants

ORDER

This cause is now before the court upon the question of this court's subject matter jurisdiction raised sua sponte by the court at a previous hearing in this case on April 24, 1975. The court has concluded that, while it perhaps has jurisdiction of this action pursuant to 28 U.S.C. § 1343(3), the proper procedure for the court to follow at this time is to stay any further proceedings in this cause pending an interpretation of Section 37-7-203, Mississippi Code Annotated (1972), by the courts of the State of Mississippi. City of Meridian v. Southern Bell Telephone and Telegraph Co., 3 L. Ed. 2d 562 (1959); Reetz v. Bozanich, 25 L. Ed. 2d 68 (1970). However, the court will retain jurisdiction of the cause pending the proceedings in the state courts. Trial Lawyers Association v. New Jersey Supreme Court, 34 L.

Ed. 2d 651 (1973); Lake Carriers' Association v. MacMullan, 32 L. Ed. 2d 257 (1972). Accordingly, it is

ORDERED:

(1) That all further proceedings in this cause are hereby stayed;

(2) That the plaintiffs are hereby granted sixty (60) days in which to institute an action in the courts of the State of Mississippi directed at a determination of the question of whether Section 34-7-203, Mississippi Code Annotated (1972) is compatible with the Constitutions of the United States and the State of Mississippi; and

(3) That failing the institution of the action referred to in paragraph two (2) above within the time there set forth, this cause shall be dismissed without prejudice.

This the 1st day of July, 1975.

/s/ (Illegible)

United States District Judge

APPENDIX B-1

**IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

No. EC 74-161-S-P

**SAMMY CARTER, et al,
Plaintiffs**

vs.

**MRS. CURTIS LUKE, et al,
Defendants**

MEMORANDUM ON BEHALF OF DEFENDANTS

Comes now RALPH HATHORN, Mayor, et al Defendants by and through their counsel of record and in response to the direction from the United States Magistrate, the Defendants respond by asserting that the Supreme Court of the State of Mississippi has rendered its opinion and decision in Cause No. 49,446 and has denied a Petition for Rehearing, copies of which have previously been furnished to this Honorable Court and because the Plaintiff has been awarded the relief sought, the Defendants say that the issues in the above styled and captioned cause are now moot and the said cause should be dismissed without prejudice.

Respectfully submitted,

Ralph Hathorn, Mayor, et al

By: /s/ James C. Mayo
Fair & Mayo, Attorneys

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CERTIFICATE OF SERVICE

I, JAMES C. MAYO, of FAIR & MAYO, ATTORNEYS
 do hereby certify that I have this day mailed by United
 States mail postage prepaid, a true and correct copy of the
 above and foregoing Memorandum on Behalf of Defendants
 to:

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Honorable Sara Gallaspy
 Mississippi Municipal Association
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Honorable Holmes S. Adams
 Attorney at Law
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Honorable Charles M. Powers
 United States Magistrate
 United States District Court
 Post Office Drawer 726
 Aberdeen, MS 39730

Dated this the 9th day of February, 1979.

/s/ James C. Mayo
 James C. Mayo